

APPEAL NO. 060186
FILED MARCH 16, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 14, 2005. The hearing officer resolved the disputed issues by deciding that the compensable injury sustained on ____, does not extend to and include right shoulder impingement syndrome, right shoulder MRI findings dated December 13, 2004 (tendinopathy without tear of rotator cuff, mild AC joint spurring where clinical impingement cannot be excluded), right elbow tendonitis, and right carpal tunnel syndrome (CTS); and that the respondent (self-insured) has not waived the right to contest compensability of the right shoulder impingement syndrome and right CTS. The appellant (claimant) appealed, disputing both the extent of injury and waiver determinations. The self-insured responded, urging affirmance. The self-insured contended that Conclusion of Law No. 4 (the waiver determination) was not appealed by either party and has become final. We note that while the claimant did not specifically list Conclusion of Law No. 4 by number, it is clear from her appeal that she disputes the waiver determination made by the hearing officer.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on ____, and that the self-insured received written notice of the claimed injury on September 21, 2004. The provision of Section 409.021(a) effective for a claim for benefits based on a compensable injury that occurred on or after September 1, 2003, provides that not later than the 15th day after the date on which an insurance carrier (or self-insured pursuant to Section 409.021(f)) receives written notice of an injury, the insurance carrier shall begin the payment of benefits as required or notify the Texas Department of Insurance, Division of Workers' Compensation and the claimant in writing of its refusal to pay benefits. Section 409.021(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. It is Section 409.021(c) that then defines the waiver period. It provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The evidence reflected that the self-insured disputed right shoulder impingement syndrome, right AC joint spurring, right elbow tendonitis, and right CTS in a Notice of Disputed Issues and Refusal to Pay Benefits (PLN 11) dated June 16, 2005.

In Appeals Panel Decision 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of a claim, the compensable injury is defined by the information that could have been

reasonably discovered by the self-insured's investigation prior to the expiration of the waiver period. The hearing officer specifically found that an MRI of the right shoulder and right wrist was taken on December 13, 2004, which was more than 60 days from September 21, 2004. A Employer's First Report of Injury or Illness (TWCC-1) dated September 21, 2004, is in evidence which states the claimant drives a bus and stated that soreness occurred because of opening and closing of door. Right shoulder impingement is noted as an assessment in several of the claimant's medical records beginning September 24, 2004. An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated October 27, 2004, noted that the claimant was alleging her shoulder was affected by her work-related injury. A medical record dated September 20, 2004, notes impingement positive. Additionally, several of the Work Status Reports (TWCC-73) dated throughout September, October and November contain a diagnosis of shoulder impingement. It is clear from the evidence presented that the claimant was alleging that her work-related injury caused damage or harm to her shoulder; that the claimant had received medical treatment for her right shoulder; and had been assessed as having right shoulder impingement within the waiver period. The hearing officer's determination that the self-insured has not waived the right to contest compensability of the right shoulder impingement is against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the self-insured has not waived the right to contest compensability of right shoulder impingement syndrome and render a new determination that the self-insured has waived the right to contest compensability of right shoulder impingement syndrome. Because the self-insured waived its right to contest compensability of the right shoulder impingement syndrome it becomes compensable as a matter of law. Therefore, we reverse the hearing officer's determination that the compensable injury does not include right shoulder impingement syndrome and render a new decision that the compensable injury does include right shoulder impingement syndrome.

It was undisputed that the claimant had previously sustained a work-related compensable injury in (prior date of injury), in the form of a right wrist fracture. The claimant subsequently developed right CTS prior to _____. The claimant testified that surgery for her right CTS had been recommended prior to _____, but had not been performed. The medical records within the waiver period indicate a diagnosis and assessment of right CTS. However, the same records indicate that this diagnosis was part of the claimant's health history prior to _____, and several of the records list the diagnosis as "remote injury" and there is a medical record in evidence dated September 24, 2004, which specifically states that the CTS is "not related to this injury." Although the initial medical records list right CTS as part of the claimant's past medical history, there is also a medical record dated November 4, 2004, which indicates a current diagnosis of CTS and note the claimant's pain included her right wrist. Additionally, some of the TWCC-73s for the current injury of _____, which are dated within the waiver period identify CTS as a work injury diagnosis. The record contains conflicting information that was discoverable by the self-insured within the waiver period regarding whether or not right CTS was part of the compensable injury. However, since the record contains some evidence which the self-insured could have discovered by a reasonable investigation prior to the expiration of the waiver period, which indicated that

the claimant had right CTS and it was alleged to be part of the compensable injury, we reverse the hearing officer's determination that the self-insured has not waived the right to contest the compensability of right CTS and render a determination that the self-insured waived the right to contest the compensability of right CTS. Because the self-insured waived its right to contest the compensability of the right CTS it becomes compensable as a matter of law. Therefore, we reverse the hearing officer's determination that the compensable injury does not include right CTS and render a new decision that the compensable injury does include right CTS.

There was conflicting evidence regarding whether or not the compensable injury extended to include right shoulder MRI findings dated December 13, 2004, and right elbow tendonitis. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination against the claimant that the compensable injury sustained on ____, does not extend to and include right shoulder MRI findings dated December 13, 2004, and right elbow tendonitis is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

We affirm the hearing officer's determination that the compensable injury sustained on ____, does not extend to and include right shoulder MRI findings dated December 13, 2004, and right elbow tendonitis. We reverse the hearing officer's determination that the self-insured has not waived the right to contest compensability of the right shoulder impingement and right CTS and render a determination that the self-insured has waived its right to contest compensability of the right shoulder impingement and right CTS. Because the self-insured waived its right to contest compensability of the right shoulder impingement and right CTS they become compensable as a matter of law. The hearing officer's determination that the compensable injury sustained on ____, does not extend to and include right shoulder impingement and right CTS is reversed and a new determination rendered that the compensable injury sustained on ____, does include right shoulder impingement and right CTS.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge